IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1943.

No. 555

THE UNITED STATES OF AMERICA, EX REL. CARL SILVER,

Petitioner,

vs.

THOMAS J. O'BRIEN, SHERIFF OF COOK COUNTY, ILLINOIS,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

ESTHER MELNICK,
ABRAHAM TEITELBAUM,
Attorneys for Petitioner,
77 West Washington St.,
Chicago, Illinois.

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Cases Cited.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

Petitioner, Carl Silver prays that a Writ of Certiorari be issued to review the judgment of the United States Circuit Court of Appeals for the Seventh Circuit, rendered on October 26, 1943.

Opinion Below.

The opinion of the United States Circuit Court of Appeals for the Seventh Circuit, upon which its judgment was based, has not yet been reported but is set out in the record (R. 60-62).

Jurisdiction.

The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925, 43 Stat. 936 (28 U. S. C. Par. 347a), subject to the rules promulgated by this Court on May 7, 1934, pursuant to the provisions of the Act of February 24, 1933, c. 119, as amended by the Act of March 8, 1934, c. 49, 48 Stat. 399 (18 U. S. C. 668).

The judgment of which review is sought did not become final until November 15, 1943 when Petitioner's petition for rehearing was denied (R. 64).

On November 22, 1943 the Mandate of the Circuit Court of Appeals was stayed by order of that Court pursuant to its rule Number 25 (R. 67).

Statute Involved.

The Statute involved derives its authority on Extradition of an alleged fugitive from justice from one state to another and is found in Art. IV, Sec. 2, Clause 2 of the Constitution of the United States, which is not self-executing, but is made effective by Section 5278 of the Revised Statutes, 18, U. S. C. A. Par. 662.

Questions Presented.

Is an indictment sufficient to form the basis of a rendition proceedings which charges defendant with a purported "Crime of Conspiracy to pass as true a forged instrument on or about the 3rd day of February, 1937 and anterior to the presentment of this indictment?" (R. 22).

Can the State of Texas demand the extradition of peti-

tioner, a citizen of another State, when it once already secured custody of petitioner by a removal proceedings on a Federal Charge which was subsequently dismissed, and after releasing him, then request extradition on a purported State charge predicated on the same facts as the Federal Indictment which was dismissed? (R. 4, 53).

Is it not true that before the Governor of Texas could legally issue a requisition upon the Governor of Illinois, it was necessary that proof of petitioner's physical presence in the State of Texas on the alleged date in the indictment be submitted to the Governor of Texas?

How could this be done when this indictment violates Amendment VI to the Constitution of the United States, and which does not inform petitioner of the time of the commission of a purported offense?

Does the mere introduction of a Governor's warrant in an extradition proceedings without any further proof make out a prima facie case for the State of Texas? (R. 53).

STATEMENT.

Nature of the Proceedings.

This is an appeal from an adverse decision in an Habeas Corpus proceeding against respondent, who was Sheriff of Cook County, testing the detention of appellant-relator, Carl Silver, who was taken into custody by said Sheriff on the alleged authority of a Governor's warrant, seeking to send relator to the State of Texas for trial on an alleged criminal charge of conspiracy to pass a forged instrument. The Governor's warrant is at variance with the indictment as to dates (R. 22, 52).

Pleadings.

Habeas Corpus petition was filed alleging restraint to be illegal, that relator was not a fugitive from Texas; that he was not in Texas on or about February 3, 1937 and anterior to the presentment of this indictment, the date of the alleged commission of the crime of conspiracy to pass a forged instrument; that he was charged with the same offense covering the same alleged acts in the Federal Courts and that he was dismissed; that he was removed from the State of Illinois to the State of Texas on said Federal Charge in June, 1937 and was lodged in the Webb County, Texas jail for several months, and then subsequently released; that the State of Texas had full custody of relator and had several opportunties to try relator (R. 2, 3, 4, 5).

The respondent filed a motion to strike said petition for Habeas Corpus on the ground that relator did not exhaust his remedies in the State Courts. After a full hearing the

District Court overruled the State's Motion to Strike. The Respondent then filed a return alleging the issuance of the Governor's warrant (R. 6-10).

Upon trial of this case by agreement with the State, the petition for Habeas Corpus stood as a traverse to respondent's return (R. 14).

Facts.

Respondent introduced a copy of the Governor's warrant of the State of Illinois and then rested its case. Neither a copy of an indictment, nor an affidavit charging relator with having committed a crime was introduced in evidence in these proceedings nor was evidence introduced that relator was a fugitive from Texas (R. 51-53).

Appellant introduced the following facts to corroborate the petition for Habeas Corpus:

1. An exemplified and certified copy of the Federal Indictment and Dismissal of same alleging same facts (R. 53).

2. Testimony of relator, Carl Silver, who specifically denied being present in the State of Texas on February 1st, 2nd and 3rd, 1937, the date alleged in the indictment, that the Assistant Attorney General threatened relator with the following words while he was on the witness stand in these proceedings, when the Court took a minute recess, "Just wait until I get you in Texas and I'll show you who's phoney" (R. 56, 57).

3. By stipulation and agreement the testimony of Milton Kagen was introduced to have the same effect as if he were personally present. He testified that he was the manager of the Sheridan Leland Drug Store, Chicago, Illinois, and that he made an arrangement with Carl Silver to take over the liquor department of the Drug Store, that

Carl Silver was in said Drug Store from January, 1937 to May, 1937 and that Carl Silver was in the store on February 3, 1937 (R. 53, 54).

4. Mr. Hyman Brown testified that in 1937 he was a bakery driver for the Rubin Bakery servicing the Sheridan Leland Drug Store, and that he delivered merchandise to said store every day and saw Carl Silver at said drug store for several months, every day since January, 1937 (R. 54, 55).

5. Mr. Joseph Sonkin testified that he was in the meat business, that he was servicing the Sheridan Leland Drug Store Account for several years until 1940, and that he saw Carl Silver at the drug store every day from January, 1937 to middle of June, 1937 (R. 55, 56).

Hotel registration cards bearing ink dates, typewritten dates, pencil marks and even a stamped date in 1929 were not introduced into evidence by the State but merely identified. One of these cards bears the signature of relator, and relator testified that the dates were "Phoney". This was done when the State called the relator back to the stand as its witness.

The State then called a Mr. C. R. Davis, an F. B. I. representative from the State of Texas, who testified that he saw Carl Silver in the Webb County Jail, Texas, in 1938. Upon cross-examination he stated that he did not see Carl Silver in the State of Texas during 1937 (R. 57).

The State then called Mr. Benjamin Woodall, Assistant Attorney General of Texas who testified that on two different charges of $50 offenses, relator signed bonds which were later forfeited, and that these charges in the bonds had nothing to do with the alleged offense (R. 57).

The only scintilla of evidence introduced by the respondent was a deposition taken of a witness, E. J. Wormser, a constable in Webb County, Texas on January 14, 1943.

It is respectfully charged that said deposition does not have the proper certification attached thereto and it seems that said deposition arriving in Illinois and filed in the United State Clerk's Office on January 15, 1943, when mail takes two to three days from Texas, seems an improbability unless the deposition was taken and prepared before said date, and that an objection to its introduction was timely when made on January 19, 1943, the date of the hearing in the trial proceedings (R. 57, 58).

The deposition itself does not aid in the State's case for the reason witness said that he was mistaken as to dates, that he got his dates haywire. The witness further stated that he found that the party's name was Carl Silver through information of different bell boys and clerks; that in February, 1938, he first found that a Mr. Tom Dix passed some bogus bond, whereas according to the Federal Indictment which was returned on May 10, 1937, it was specific as to an alleged offense having been committed in February, 1937. That he personally knew the hotel men who kept the hotel records and that he had access to them (R. 58).

SPECIFICATION OF ERRORS TO BE URGED.

The Circuit Court of Appeals erred:

1. In holding that the mere introduction of the Governor's warrant in an extradition proceedings makes out a prima facie case.

2. In holding that the trial Court did not err in not discharging relator on the facts presented.

3. In holding that petitioner was not in double jeopardy when the State of Texas after securing custody of relator released him, and then again trying to extradite petitioner a citizen of another State, on same facts presented.

REASONS FOR GRANTING THE WRIT.

1. The Court below has decided an important question of Federal law which has not been, or should be, settled by this Court.

2. The decision of the Court below is inconsistent with the principles established by decisions of this Court.

PROPOSITIONS OF LAW AND AUTHORITIES IN SUPPORT OF ARGUMENT.

I.

Extradition proceeding are not creatures of State Law, but are controlled by Federal Constitution and Statutes.

Smith-Hurd Ann. St. Ill. C60 Par. 1.
18 U. S. C. A. Par. 662, 663.
Const. Art. 4, Par. 2.

II.

Requisition issued by demanding Governor must contain copy of indictment found, or affidavit made before magistrate charging person demanded with having committed crime therein, certified as authentic by demanding Governor.

18 U. S. C. A. Par. 662, 663.
Const. Art. 4, Sec. 2.

III.

Federal Statute regarding extradition is one involving substantial rights of citizens, and its essential elements must be strictly followed.

18 U. S. C. A. 662, 663.

IV.

Alleged fugitive has right not to be imprisoned or dealt with by States in disregard of safeguards provided by Federal Constitution and Statutes.

18 U. S. C. A. 662, 663.

Const. Art. 4, Par. 2.

V.

Alleged fugitive could abandon habeas corpus proceedings in State court at any stage of proceedings and avail himself of any other remedy, such as habeas corpus proceeding in Federal Court.

United States ex rel. McCline v. *Meyering*, 75 Fed. (2nd) 716.

VI.

Where only warrant and not affidavit or indictment was certified by Governor of demanding State, requisition was void, and could not form basis for extradition proceedings.

United States ex rel. McCline v. *Meyering*, 75 Fed. (2nd) 716.

VII.

Where by a preponderance of evidence, in an habeas corpus proceedings involving interstate rendition, the relator has established by clear and convincing evidence that he was not in the demanding state at the time the alleged offense was committed, the petitioner should be discharged from custody.

U. S. Constitution Art. IV, Sec. 2.

VIII.

The Constitution of the State and of the United States guarantees to relator that he shall not be deprived of life, liberty or property without due process of law.

Sec. 2, Art. 2, Bill of Rights.
Illinois Constitution 1870.
United States Const. Amend. V and XIV.
Sheldon v. *Hoyne*, 261 Ill. 222.
Chicago v. *Wells*, 236 Ill. 129, 23 L. R. A. N. S. 405.
12 C. J. 1194-1195.

IX.

The guarantee of due process of law extends to judicial proceedings which may interfere with personal rights.

Sheldon v. *Hoyne*, 261 Ill. 222.
People v. *Strassheim*, 242 Ill. 359, 366.
12 C. J. 1190, 1191.

X.

Guarantees of the 5th and 14th Amendments of the U. S. Constitution require that the citizen's right of life, liberty and property, be tried by a regular and orderly mode of procedure, in a court of competent jurisdiction and that he be given an opportunity to be heard in his defense and to openly in court appear to protect and enforce his rights.

Illinois v. *Lewis*, 35 Ill. 417 at 421.
Citizens etc. v. *Belleville*, 47 Ill. App. 388, 407.
12 C. J. 1234, Sec. 1009, Note 1.
12 C. J. 1220, Sec. 997, N. 80 & 89.

XI.

A Federal Court has no discretion to decline jurisdiction where the case presented is one to which its powers extend, and the exercise of that power is properly invoked.

25 C. J. 693, Notes 79 & 80.

McClellan v. *Garland,* 217 U. S. 268.

Wilcox v. *Consolidated Gas Co.,* 212 U. S. 19.

Ex Parte Young, 209 U. S. 123.

XII.

State laws and decisions cannot determine for the Federal Courts what constitutes sufficient process of law, sufficient service, or sufficient appearance of parties, but they must exercise their independent judgment in deciding these questions notwithstanding the full faith and credit provisions of the Constitution.

Michigan Trust Co. v. *Ferry,* 175 Fed. 667, 99 C. C. A. 221;

175 Fed. 681, 99 C. C. A. 235;

228 U. S. 346, 33 S. Ct. 550.

ARGUMENT.

The point of argument as brought out by the evidence in the record filed, conclusively proves that petitioner was not in the State of Texas at or during the time charged in the Governor's warrant.

The testimony of three witnesses is unrefuted that petitioner-appellant was in Chicago from January to May of 1937 (R. 53-57).

The fact that respondent rested its case upon the introduction of the Governor's warrant renders the respondent's case fatally defective as shown in *U. S. ex rel. McCline* v. *Meyering*, 75 Fed. (2nd) 716.

The further fact that appellant was taken into custody in Chicago and removed through the Federal Court of Chicago to the Federal Court of Texas in 1938, and lodged in the Webb County Jail, Texas, is significant to show that the State of Texas could have proceeded to indict and try appellant upon the dismissal of the Federal indictment which alleged the same charges and overt acts as the State now charges. The fact that petitioner was confined for several months in the County Jail in Texas in 1938 awaiting trial on the Federal charge proves that the State of Texas had both constructive notice and actual notice and custody of Carl Silver in the State of Texas and that he was available to the State of Texas for indictment and trial. Is not the State of Texas estopped to demand again this custody? Why should a citizen be tossed around like a football?

The threat of the Assistant Attorney General to petitioner while he was on the witness stand "Wait until I get you down in Texas, I'll show you who is phoney" is manifested by ill motives and not predicated upon law or

reason (R. 57). It is respectively pointed out here that it is not that appellant fears any trial, but a trial in Texas by a prosecutor who would turn out to be a persecutor. This would definitely defeat the ends of justice and prevent petitioner from securing a fair and impartial trial.

The rule of law is academic that a party is precluded from asserting a fact when it had an opportunity to do so or refrain from so doing, otherwise there would be no finality to litigation.

Under the proof tendered by the State's Attorney in only introducing the Governor's warrant, the Court is definitely unable to determine the validity of any indictment or charge. Had such an indictment been introduced then further arguments could have been had as to its validity. In the case of *United States ex rel. McCline* v. *Meyering,* cited *supra,* the court held, "where only warrant and not affidavit or indictment was certified by Governor of demanding State, requisition was void and could not form a basis for extradition proceedings".

The Governor's warrant alleges the crime of conspiracy to pass as true, a forged instrument. Without examining any further papers, how could any Court determine whether a crime was committed? The bare statement without alleging scienter or knowledge that the relator knew that a document was false is of no legal efficacy.

It has always been the established policy of the Federal Courts not to deny due process to any person. Due process is defined as "a law which hears before it condemns, proceeds upon inquiry and grants judgment after fair trial". The burden of the respondent fell far short of this measurement to call upon a citizen of one state to stand trial on a charge in another state under circumstances as hereinabove described.

Conclusion.

The evidence clearly establishes that the relator was not in the demanding State at the time of the commission of the alleged crime.

The hotel records only identified but not introduced into evidence are "Phoney" as testified, meaning "false", as to dates, and are of no value.

The only evidence introduced by the State, the Governor's warrant, did not make out a prima facie case for the State.

The hostility of the agent of the State of Texas in threatening the relator while on the witness stand, clearly shows to what lengths he would go to bring Carl Silver into the State of Texas.

The failure of the State to introduce the indictment renders its side of the case definitely faulty, for the reason that the Court was unable to determine whether or not the indictment was void, hence violating the relator's constitutional guarantees.

In view of the important Federal questions presented, it is our belief, that this case is an appropriate one for review by this Court.

Therefore it is respectfully urged that the petition for writ of certiorari be granted towards the end to reverse the decision of the lower courts.

Respectfully submitted,

ESTHER MELNICK,
ABRAHAM TEITELBAUM,
Attorneys for Carl Silver,
Petitioner.